



State of Wisconsin
Governor Scott Walker

Department of Agriculture, Trade and Consumer Protection

Ben Brancel, Secretary

DATE: October 30, 2013

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Ben Brancel, Secretary
Sandy Chalmers, Administrator, Trade and Consumer Protection Division

SUBJECT: ATCP 110, Home Improvement Practices (Final Draft Rule)

PRESENTED BY: Michelle Reinen and Kevin LeRoy

REQUESTED ACTION:

At the November 13, 2013 Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the DATCP Board to authorize the final draft of a proposed rule (copy attached) related to home improvement practices. This rule makes some updates and revisions to existing DATCP rules.

SUMMARY:

Rule Content

ATCP 110 currently regulates home improvement practices. Pursuant to the definition of "home improvement," new residential construction is outside of the scope of the current rule and DATCP does not regulate trade practices in the construction of new homes.

Under this proposed rule, the rights and duties contained in ATCP 110 would not apply to very large home improvement projects, defined as those where the value of the project is more than the assessed value of the existing structure. A typical example of this might be a contract to build a new structure on a preexisting foundation.

Under the current rule, home improvement contractors must obtain all required state or local building permits before work can begin under the contract. Under this proposed rule, if a home improvement contract consists of multiple subprojects, contractors may start work on the overall project before obtaining all building permits. However, they may not begin work on a subproject that requires a building permit until after they obtain the permit.

Under the current rule, where a midpoint or final inspection is required by state law or local ordinance, the seller must provide the inspection certificate to the buyer. This proposed rule retains this provision, but in the event the inspector does not physically issue a certificate, the seller may provide a summary of inspection information to the buyer instead of a copy of the certificate.

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Under the current rule, sellers must provide manufacturers' product warranties either at the time the buyer and seller enter into the contract or when the product is installed. Under this proposed rule, the seller has the option of providing written manufacturers' warranties at the completion of the project as long as the option is specified in the contract.

Under the current rule, if a home improvement contract contains liquidated damages that penalize a buyer for breaching the contract, the liquidated damages may not exceed 10% of the contract price or \$100, whichever is less. This proposed rule maintains the 10% limit, but it repeals the \$100 maximum.

Under the current rule, the seller may not substitute products or materials from those specified in the home improvement contract, or for those which the seller represented would be used, without prior consent from the buyer. If the home improvement contract is in writing, the prior consent must also be in writing.

The proposed rule maintains the same procedure for altering written contracts as contained in the current rule. However, the proposed rule also allows for buyer authorized verbal alterations to the contract, but only if the following conditions are met:

- The alteration does not represent any additional cost to the buyer
- The alteration does not represent a decrease in the value of the finished product.
- The seller maintains documentation of the alteration, and that the buyer authorized the alteration.

Under the current rule, the seller is required to provide the buyer with lien waivers before accepting final payment. Further, if the contract requires partial payments at various stages in the performance of the contract, the seller is required to provide lien waivers for the proportionate value of all labor, services and products or materials furnished or delivered as of the time partial payment is made. Under the proposed rule, the seller is required to provide the lien waivers if the buyer requests them. Under the proposed rule, the seller is required to provide notice to the buyer that the buyer has a right to request the lien waivers, and retain evidence that the buyer acknowledged receipt of the notice.

Under the current rule, sellers are required to give buyers timely notice of any impending delay in contract performance. If the home improvement contract is in writing (or required to be in writing), the buyer must agree in writing to the change in the schedule. This proposed rule provides that sellers are not responsible for delays caused by action or inaction of the buyer, destructive acts of nature, or disruptive civil disorder.

Under the current rule, if a seller represents that insurance or some other form of protection is provided, the contract must clearly state the terms, conditions and limitations, as well as the name and address of the insurer. Further, the seller is required to furnish a copy of the insuring or protection agreement to the buyer before final payment is made. This proposed rule does not substantially change this requirement, except that it allows the contractor to provide a proof of insurance document rather than the entire policy or agreement.

The current rule contains protections for buyers in the event that the seller fails to complete the project, but also assigns the rights to collect payment to a third party. This proposed rule does not alter this provision, but it inserts an explanatory note.

Under current rules, sellers who provide basement waterproofing services are regulated as home improvement contractors under Ch. ATCP 110 and under Ch. ATCP 111 – Basement Waterproofing Practices. This proposed rule consolidates the content of Ch. ATCP 111 into a section of ATCP 110, without making any substantive changes.

Changes From Hearing Draft in Response to Public Hearings and Rules Clearinghouse Comments.

DATCP made a number of changes in response to comments received from the public and from Legislative Council Rules Clearinghouse.

Deregulating major renovations

The hearing draft limited the scope of Ch. ATCP 110 by excluding “major renovations to an existing structure” from the definition of home improvement. The hearing draft defined “major renovation” to be a project the price of which is equal to or greater than the assessed value of the property. The proposed final draft rule revises the definition of “major renovation” to be greater than the assessed value of the existing structure.

Technical changes

The proposed final draft incorporates a number of technical changes based on Rules Clearinghouse suggestions.

Change orders

Both the hearing draft and the proposed final draft allow deviations from the written contract under limited circumstances. The proposed final draft inserts a note that makes clear text messages, e-mails and other forms of electronic communication satisfy requirements for communications to be in writing. The proposed final draft revises the provisions related to verbal change order to make the provisions more readable, without making substantive changes.

Lien waivers

Under the current rule, sellers must provide written lien waivers from all contractors, subcontractors, and material suppliers before accepting payment. This is true for both final payments at the conclusion of the project and any partial payments that occur while work is in progress. The hearing draft modified this requirement for partial lien waivers by allowing buyers to waive their right to receive partial lien waivers. The proposed final draft requires lien waivers (either partial during the contract or final at the end) only if the buyer requests them. The proposed final draft also requires sellers to provide buyers with a statement describing the purpose of lien waivers and that the buyer may request them.

Delays in contract performance

The current rule requires that, if there is a delay in the performance of the contract, the seller must provide notice to the buyer. The notice must specify the reason for the delay and propose new deadline dates. If the contract is in writing, no change in deadlines is effective unless the buyer agrees in writing to the change. Both the hearing draft and the final draft maintain this provision. However, the hearing draft specifies that the seller is not responsible for delays in contract performance that are caused by the buyer. The proposed final draft also provides that the seller is not responsible for delays caused by destructive acts of nature or disruptive civil disorder.

Building Inspection Certificates

The current rule requires that, in the case where building inspections are required, the seller furnish a copy of the inspection certificate to the buyer. This is still true under the hearing draft, but in the event the building inspector did not issue a paper certificate, the seller can, instead, provide certain information about the inspection to the buyer. The proposed final draft retains this provision, but revises the exact wording for better clarity.

Insurance Documents

The current rule requires when a representation is made that insurance or some other form of protection will be provided, the seller must provide the buyer a copy of the insurance or protection agreement. The proposed final draft provides that a declarations page or other evidence of insurance document is sufficient to meet this requirement.

Preservation of buyer's claims and defenses

The current rule specifies that a buyer retains claims and defenses even if the seller assigns the contract to a third party. The hearing draft does not alter this provision, but contains an explanatory note. The proposed final draft revises the note to improve clarity.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations.

The federal government does not, in general, regulate home improvement practices.

Comparison with Rules in Adjacent States

Most states, including all of Wisconsin's neighbors, have home improvement practices laws. Many of the provisions in ATCP 110 are common in these other states as well.

Illinois regulates home improvement practices through its Home Repair and Remodeling Act and its Home Repair Fraud Act. These provisions are generally similar to Wisconsin's Home Improvement Practices rule.

Iowa grants consumers a private right of action, which enables consumers to sue businesses that engage in deceptive or unfair practices, misrepresentation, or failure to disclose material facts. This law covers home improvement practices, among other areas.

Contractors who do home improvement work in Minnesota and Michigan are required to obtain a license from the state (there are some exceptions). In Minnesota, licensed contractors are required to pay into the Minnesota Contractor's Recovery Fund. This fund compensates people who have suffered losses due to a licensed contractor's fraudulent, deceptive or dishonest practices, misuse of funds, or failure to do the work the contractor was hired to do.

Summary of Factual Data and Analytical Methodologies

The Wisconsin Builders Association estimates that this proposed rule would result in cost savings of roughly \$1 million per year for remodelers and homeowners. This estimate is based on a projection that the proposed rule simplifies compliance and reduces paperwork by about 2 hours per job. Based on an average wage-plus-overhead amount of \$50 dollars per hour, and that there are roughly 10,000 remodeling projects per year in Wisconsin, the total savings is \$1 million.

On a national basis, fixr.com (a web-based contractor referral service) has reported the extent of the home improvement industry on a national basis.

United States Annual Averages 1995 - 2009

	Number of Projects	Total Expenditure	Average Cost Per Project
Room additions and alterations	1,156,018	\$ 23,141,745,151	\$ 20,019
Systems and equipment	9,462,782	\$ 15,061,419,820	\$ 1,592
Outside attachments	549,917	\$ 3,560,131,931	\$ 6,474
Kitchen remodels	1,052,211	\$ 10,638,971,786	\$ 10,111
Other property additions and replacements	3,758,351	\$ 19,767,613,249	\$ 5,260
Exterior additions and replacements	5,636,949	\$ 23,734,265,908	\$ 4,210
Interior additions and replacements	5,186,460	\$ 13,211,085,021	\$ 2,547
Bath remodels	1,030,736	\$ 6,475,917,156	\$ 6,283
Disaster repairs	528,062	\$ 6,448,663,562	\$ 12,212

<http://www.fixr.com/infographics/us-home-improvement-industry-at-a-glance.html>

Complaints against home improvement contractors are consistently ranked in the top ten complaint categories received by The Bureau of Consumer Protection. In 2012, DATCP received 391 written complaints against home improvement contractors.

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

DATCP has consulted with the Wisconsin Builders Association and the National Association of Remodelers – Milwaukee Chapter on the economic impact and the small business impact of this rule.

Effect on Small Business

DATCP anticipates that this rule would affect small business. The existing ATCP 110 regulates businesses that provide home improvement services. Many of these businesses are "small businesses." They include general contractors, landscapers, plumbers, roofers, window installers, cabinet makers, electricians, and many more. Some of changes to ATCP 110 proposed in this rule will have an effect on some of these businesses. However, DATCP anticipates that those effects will be beneficial. The proposed rule streamlines existing regulations to make them easier for home improvement providers to comply. But the rule does not eliminate these regulations, thereby preserving important protections for consumers. This rule may benefit home improvement contractors in the following ways:

- General contractors working on significant reconstruction projects would no longer be regulated under this proposed rule. Currently, Ch. ATCP 110 does not regulate new home construction but it does regulate home improvement projects. Under this proposal, major reconstructions – those projects where the price of the contract is greater than the assessed value of the preexisting structure -- would be treated like new home construction.
- For all home improvement contractors, this rule provides some additional flexibility (as long as certain conditions are met). Including:
 - Building permits need only be obtained before work on that portion of the project concerning the building permit. Otherwise, all required building permits must be obtained before any work is completed.
 - Sellers can provide written manufacturers' warranties at the conclusion of the work. Otherwise, written manufacturers' warranties must be provided at the time the product is installed.
 - Under very limited circumstances, sellers can deviate from the written contract based on verbal agreements between the buyer and the seller.
 - The seller cannot be held responsible for delays in contract performance if the seller can demonstrate that delay was caused by actions or inactions of the buyer, destructive acts of nature, or disruptive civil disorder.

Environmental Impact

This rule does not have an environmental impact.

Next Steps

If the Board approves this final draft rule, the department will submit the final draft rule to the Governor's Office of Regulatory Compliance. If the Governor's office approves the final draft rule, the department will then submit the rule to the legislature for legislative committee review. If the Legislature has no objection to the rule, the department Secretary will sign the final rulemaking order and transmit it for publication. The rule will take effect on the first day of the third month following publication.

Appendix A

RULEMAKING HEARING Public Hearing Appearances and Written Testimony

Rule Subject: Home Improvement Practices and Basement Waterproofing
Adm. Code Reference: ATCP 110, Wis. Adm. Code
Rules Clearinghouse #: 13-066
DATCP Docket # 12-R-08

Public Comments Received

DATCP received comments on this rule from 118 individuals. The content of the comments was essentially unanimous. Two trade organizations, The Wisconsin Builders Association (WBA) and the Milwaukee Chapter of the National Association of the Remodeling Industry (NARI) coordinated the submission of comments from their members.

Public Hearing Attendance Cards-Position on Rule and Verbal Testimony

DATCP held four public hearings on the rule:

- Madison on September 24, 2013
- Eau Claire on September 26, 2013
- Milwaukee on October 1, 2013
- Green Bay on October 2, 2013

There were no attendees at three of the hearings. There were six attendees at the Milwaukee hearing. One individual, David Pekel representing NARI, provided verbal & written testimony at the Milwaukee hearing.

Written Testimony Received During Comment Period

Last Name	First Name	Title	Business	City
Wendorf	Shawn	Office Administrator	Quality Remodeling Specialist Inc	
Barenz	Ronny	Director of Business Development	Barenz Builders	
Smukowski	Jim	Vice President / Owner	J&J Construction Lake Country, Inc	Dausman
Ripple	Terry	President	The Cabinetree of WI Inc	
Loppnow	Jack	Vice President	Robertson Ryan and Associates	
Wolff	Todd	Owner	Highland Builders LLC	
Grau	Michelle		Professional Construction Inc.	Waukesha

Last Name	First Name	Title	Business	City
Hoffmann	Mark	Owner	Bedrock Granite	
Kohls	Steven R	Manager	Kohls Floor Covering, Inc	
Bates	Robert	President	Badger Carpentry	Pewaukee
Stano	Mathew M	President	Stano Landscaping, Inc.	Milwaukee
Zastrow, CR	Tom		Phantom Creek Builders, LLC	Mukwanago
Sannes, C.R., C.G.R	Gary	President	SJ Janis Company, Inc.	Wauwatosa
King	Kory		Schoenwalder Plumbing Inc	Waukesha
Cape	Robert	Vice President	J.D. Griffiths Co., Inc.	Milwaukee
Krueger	Leah		L. H. Krueger and Son, Inc.	Waukesha
Riedel	Dan	President	NARI -- Milwaukee Chapter	Wauwatosa
Bartelt	Richard		Bartelt	Delafield
Bayer	Barbara	President	Bayer and Bayer, Inc.	Muskego
Kawczynski	Gary		Jen Chris Company, LLC	Grafton
Callen	Thomas C.	President	Callen Construction, Inc	Muskego
McLean	Andrew	Operations Manager	Burant Heating and Air Conditioning	Franklin
Baird-Luedke	Anna		Coello & Associates, Inc.	Waukesha
Cyborowski	Jerry	President	J&J Contractors I LLC	Oak Creek
Hucke	Daniel J	President	Hucke Drywall Inc.	Hartland
Meehan	Jeff J	Vice President	Quality Window Specialists, Inc.	Butler
Rink, CR	Tony		Renovators, LTD	Elm Grove
Cluigley	Robert B	President	Brillo Home Improvement, Inc	Milwaukee
		Secretary / Treasurer	Brillo Home Improvement, Inc.	Milwaukee
Rose, P.E.	Gervase R.	C.E.O.	Roman Electric Co., Inc.	Milwaukee
Buss, Sr.	Terry	Secretary and Treasurer	Suburban Asphalt Co., Inc.	Franklin
Sobieski	Steve		Weisfloss Design Center, LLC	Nashotah
	Mike	Managing Member	Winters Reomodeling Group LLC	Wauwatosa
Ciesielyk	Aaron B.	Owner	Aaron's Building Services	New Berlin
Eckland	Peter	President	Lakeland Building Supply	Gurnee
Nelson	Larry	Sales Director	Knutson Bros.	Milwaukee
Wandsnider, RLA, CLP	William	President	Wandsnider Landscape Architects	Menomonee Falls
L	B	President	Creative Construction of WI, Inc.	Franklin
Gugger	Jack	President	Gugger Construction, Inc.	Madison
Killian	Rod	President	Productive Builders Inc.	Menomonee Falls
Klappa	Daniel	CEO	JDJ Builders, Inc	Greenfield

Last Name	First Name	Title	Business	City
Gabor	Nathan	Owner / Manager	Gabor Design Build, LLC	Mequon
Kruger, CR	Diane		Carl Krueger Construction	Milwaukee
Wood, CR	Michael		Callen Construction, Inc.	
Whittmann	Christopher		Callen Construction, Inc.	
Conner, CR	Ken		Conner Remodeling & Design, Inc.	
Anundson, PE, MCR, CKBR, CAPS	Kevin	Owner	Assisted Remodeling	
Kraemer, CRM, CIC	Paul		The Starr Group	
Brick	Mark		B&E General Contractors	
Rathmanner	Dave		First Supply, LLC	
Burback, CR, UDCP	Rick		Burback Builders	
Scifo, CR	Susan		ServiceMaster Recovery Services	
Frueden	Gary		Standard Roofing Co., Inc.	
Bergmann	Rebecca		Cardinal Homes, LLC	
Kruger	Natalie		Klam Construction	
Sherman	Andrea		Accurate Basement Repair, LLC	
Mancuso, CWS, CSRS	Chris		Accurate Basement Repair, LLC	
Preiss	Brian		Mor Strategy Group, LLC	
Pitzen, CR, ALA	Jim		Pitzen Design, LTD	
Latsch, CR	Kevin		Design Tech Remodeling	
Herriges, CKBR	Julie		Urban Herriges & Sons, Inc.	
Lorentzen	Robyn		ServiceMaster Recovery Services	
Klug	Chris		ABC Audio Video, LLC	
Johannsen	Brendt		The Starr Group	
Neulreich	Walter		McCoy Contractors, Inc.	
Madsen	Robert		Halquist Stone	
Herriges, CLC	Joe		Urban Herriges & Sons, Inc.	
Herriges	Lisa		Urban Herriges & Sons, Inc.	
Meiners	John		DG Remodeling	
Brinkmann	Barb		Barb's Interior Design, Inc.	
McDaniel, CPO-CD, cSMM	Brenden		Action Organizing Services, LLC	
M	Z			
Volz	Sharon		DG Remodeling	
Kords	Ron		Kordus-Schuster Plumbing, Inc.	

Last Name	First Name	Title	Business	City
Keel, CSP, CAPS, CCP	Susan		Advanced Communication Specialists	
Hapka	Deanne		Hapka Contracting, Inc.	
Lococo	Nancy		JM Remodeling & Construction LLC	
Trego JR	Michael P.		Trego Architects, LLC	
Hannan	Mary Lee			
Hackbarth	John		Hackbarth Builders, Inc.	
Glisch	Mark		Premiere Kitchen Designs, LLC	
Sweenel	K P			
Koehler	James		Star Satellite	
Charno	Milt		Milt Charno & Assoc. Inc.	
Fraul	Stan G		Renewal by Anderson of Milwaukee	
Miller	Randy		Allrite Home and Remodeling Inc.	
Moeschbryn	Thomas G.		Milwaukee Journal Sentinal	
Brehmer	Mark			Sun Prairie
Hendricks	Jill			De Pere
Liebl	William			Middleton
Maurer	KC			Winneconne
Degnan CGR, CGB, CAPS	Abe			De Forest
Sabel	Jeff			Valders
Breiwa II	George R			Highland
Tews	Randy			Eau Claire
Rakowski	Craig			New Berlin
Miller	Ed			Cedarburg
Downs	David			Neenah
Schaffer	Greg			Fitchburg
Sickler	Chad			Wausau
Hartwig	Tena			New Holstein
Atlija	Dara			Muskego
Pekarske	Mark			Reedsville
Puyleart	Scott			Green Bay
Church	Leon			Appleton
Diermeier	Jack			Rhineland
Boycks	Brad			Middleton
Johnsen	Kathy			Madison
Mathie	J. Scott			Waukesha
Werner	Bob			Sheboygan
Gigstead	Jack			Sturgeon Bay

Last Name	First Name	Title	Business	City
Bartow CAPS	Brandon			Manitowoc
Johansen	Chuck			Hayward
Birmingham	Thad			Sturgeon Bay
TenPas, CAPS	Brad			Waldo
Kuchera	Todd			River Falls
Etrheim	Mark			Onalaska

Summary of Public Comments

The text below is from the written testimony submitted by Dan Riedel, President of NARI – Milwaukee on September 11, 2013. All other testimony referenced this letter and supported the positions stated in it.

On behalf of the Milwaukee/NARI Home Improvement Council and our more than 900 members, we wish to thank the Department of Agriculture, Trade and Consumer Protection for its efforts to update and improve ATCP 110. The current draft of the rule is a good start. However, further revisions are needed to modernize the rule, protect consumers, and level the playing field for numerous Wisconsin remodelers. We request that you make the following additional changes to the proposed rule:

Product and Material Substitution

Include language in the rule that would permit the buyer to agree verbally, via text message, email, or in writing to substitutions in products or materials.

Indicate that the buyer may not unreasonably withhold approval where the substitution is necessary due to circumstances outside the control of the seller.

State that if the buyer elects to upgrade the product or material, then the additional costs may be passed onto the buyer.

Lien Waivers

The proposed rule changes do not streamline the process for dealing with lien waivers. The proposed changes actually make it more cumbersome. We ask that you amend the proposed rule so that the seller is only required to present lien waivers upon the demand of the buyer.

Contractors understand that they have to follow the Wisconsin lien laws. The proposed changes add burdens to contractors who are good actors and will not prevent the problems that arise with bad actors.

If you would like to include model contract language providing that lien waivers will be held till the end unless requested by the buyer, the following is an example:

I understand that contractors, subcontractors, and materials suppliers may have a right to file a lien against my property if they are not paid for their products or services. I further understand that obtaining lien waivers prevents these liens. Wisconsin law (ATCP 110, Wis. Adm. Code) requires sellers of home improvement services to provide the buyer with lien waivers from all contractors, subcontractors and material suppliers, upon request of the buyer, at the time the buyer makes payments. If the home improvement contract requires partial payments at various stages in the performance of the contract, the buyer may demand that the seller provide lien waivers for the proportionate value of labor, service and products or materials furnished or delivered as of the time the partial payment is made. I agree to waive and requirement that the seller provide lien waivers to me at the time partial payments are made.

Delays

Include language that does not penalize sellers for a delay if the delay was due to circumstances beyond the control of the seller. Include language indicating that buyer will not unreasonably withhold agreement to extend the completion date.

Large Projects

Instead of using the assessed value of the entire property as the measure of whether a project constitutes a "major renovation," the rule should use only the value of the existing dwelling. This would be consistent with other laws that consider the value of the dwelling and recognizes that the land value often exceeds dwelling value (e.g., lakefront property, farm land).

Text and Email Documentation

It would be helpful to expressly state in ATCP 110 that email messages and text messages are permissible means to document authorization or agreement by the buyer. This is more convenient for our customers and helps avoid unnecessary delays in a project.

Eliminate Inclusion of "Other Charges" under ATCP 110.02 (6) (h)

This section places a large burden on the contractor to identify all potential "other charges" that might be assessed prior to contract execution.

Although a seller should identify all reasonably anticipated charges for the buyer in the contract in order to reduce the possibility of surprises, sometimes there are unanticipated costs and the occurrence of those charges when the seller has performed its due diligence

up front should not be a violation. The impact of this provision is to penalize a seller who makes a good faith mistake, which should not be the intent of ATCP 110.

Examples of this include: concealed conditions that are not conspicuous, (hidden conditions), orders for compliance remediation of existing conditions by building officials for work not included in the scope or performed by the seller, any modifications identified after concealing conditions are revealed.

Clarify that Contractors May File Complaints under ATCP 110.02 (8)

Building contractors have tried making complaints to DATCP when they believe that another contractor is making false disparaging remarks about them, but they have been told by DATCP that contractors cannot make complaints under ATCP 110. We request that ATCP 110 be revised to make clear that contractors do have the right to assert violations of ATCP 110.02 (8) against other contractors.

Because remodelers are often in the best position to know what is happening in our industry, giving us the ability to file a complaint is in the interest of consumer protection.

Insurance

Revise Section ATCP 110.05 (4) to say: "Where a representation is made that insurance or some other form of protection will be provided, the contract shall either clearly state the terms, conditions and limitations thereof, as well as the name and address of the insurer or the person who is to furnish such protection, if different from the seller. The Seller may comply with this section by providing a copy of the Declarations Page or Evidence of Property Insurance Form that provides said information prior to commencing work."

Change orders

Make clear it is not a violation of ATCP 110 if a Buyer orally requests a change and the Seller honors that request.

We will appreciate your efforts to further improve ATCP 110 in a manner that protects consumers and eliminates unnecessary burdens on remodelers. We would welcome the opportunity to meet with you to discuss our proposals in greater detail.

**PROPOSED ORDER
OF THE WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION
ADOPTING RULES**

1 The Wisconsin department of agriculture, trade and consumer protection proposes the following
2 rule *to repeal* ATCP 110.02 (3) (d), 110.02 (6) (L) and (m), 110.02 (7) (c), Ch. ATCP 111 Title
3 and preamble notes, ATCP 111.02 (5), and 111.06; *to renumber* ATCP 111.01, 111.02 (title)
4 and (1) to (4), (6), and (7), 111.03 (2) to (6), and (8) to (10), 111.04, and 111.05; *to renumber*
5 *and amend* ATCP 111.03 (intro) (1) and (7); *to amend* ATCP 110.01 (2), 110.02 (6) (L) to (n),
6 110.03 (1), 110.04 (1) and 110.05 (4) and (7); *to create*, 110.01 (2m), 110.023, 110.025,
7 110.027, 110.03 (3) and (4), 110.06 (1) (Note), and 110.09 (title); *relating to* Home
8 improvement practices and basement waterproofing practices, and affecting small businesses.

**Analysis Prepared by the Department
of Agriculture, Trade and Consumer Protection**

This rule revises and updates current rule relating to home improvement practices.

Statutes Interpreted

Statutes Interpreted: s. 100.20, Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1) and 100.20 (2) (a), Stats.

Explanation of Statutory Authority

DATCP has broad general authority, under s. 93.07(1), Stats., to interpret laws under its jurisdiction.

DATCP has authority under s. 100.20 (2) (a) to promulgate rules forbidding methods of competition in business or trade practices in business that are determined to be unfair. DATCP also has authority to promulgate rules prescribing methods of competition or trade practices that DATCP determines to be fair.

Related Statutes and Rules

Some of the home improvement contractors regulated by ATCP 110 may also be regulated by Ch. 101 – Subchapter II, One and Two Family Dwelling Code, Wis. Stats., associated Department of Safety and Professional Services (DSPS) administrative rules, and building codes administered by local units of government. Under statutes and rules administered by DSPS, persons who apply for building permits for one or two unit dwellings (and who are not an owner and resident), are required to have a Dwelling Unit Contractor Certification from DSPS. These statutes and rules do not distinguish between building permits for new construction and building permits for home repairs or improvement. Therefore, those certified dwelling unit contractors who specialize in new home construction are not regulated by ATCP 110. And those home improvement contractors who perform jobs that do not require building permits are not regulated by the dwelling unit contractor certification program.

Section 100.65, Wis. Stats., Residential Contractors, was recently created by 2013 Wisconsin Act 24. Generally, this act regulates contracts for replacement or repair of roof systems and other exterior repair, replacement, construction, or reconstruction projects in cases where property insurance claims are involved. This statute contains some specific notice requirements, rights for consumer to cancel a contract if insurance claim is denied, and certain restrictions on contractors' actions relating to insurance claims.

Plain Language Analysis

Rule Content

ATCP 110 currently regulates home improvement practices. Pursuant to the definition of "home improvement," new residential construction is outside of the scope of the current rule and DATCP does not regulate trade practices in the construction of new homes.

Under this proposed rule, the rights and duties contained in ATCP 110 would not apply to very large home improvement projects, defined as those where the value of the project is more than the assessed value of the existing structure. A typical example of this might be a contract to build a new structure on a preexisting foundation.

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Under the current rule, sellers must provide manufacturers' product warranties either at the time the buyer and seller enter into the contract or when the product is installed. Under this proposed rule, the seller has the option of providing written manufacturers' warranties at the completion of the project -- as long the option is specified in the contract.

Under the current rule, if a home improvement contract contains liquidated damages that penalize a buyer for breaching the contract, the liquidated damages may not exceed 10% of the contract price or \$100, whichever is less. This proposed rule maintains the 10% limit, but it repeals the \$100 maximum.

Under the current rule, the seller may not substitute products or materials from those specified in the home improvement contract, or for those which the seller represented would be used, without prior consent from the buyer. If the home improvement contract is in writing, the prior consent must also be in writing.

The proposed rule maintains the same procedure for altering written contracts as contained in the current rule. However, the proposed rule also allows for buyer authorized verbal alterations to the contract, but only if the following conditions are met:

- The alteration does not represent any additional cost to the buyer
- The alteration does not represent a decrease in the value of the finished product.
- The seller maintains documentation of the alteration, and that the buyer authorized the alteration.

Under the current rule, the seller is required to provide the buyer with lien waivers before accepting final payment. Further, if the contract requires partial payments at various stages in the performance of the contract, the seller is required to provide lien waivers for the proportionate value of all labor, services and products or materials furnished or delivered as of the time partial payment is made. Under the proposed rule, the seller is required to provide the lien waivers if the buyer requests them. Under the proposed rule, the seller is required to provide notice to the buyer that the buyer has a right to request the lien waivers, and retain evidence that the buyer acknowledged receipt of the notice.

Under the current rule, sellers are required to give buyers timely notice of any impending delay in contract performance. If the home improvement contract is in writing (or required to be in writing), the buyer must agree in writing to the change in the schedule. This proposed rule provides that sellers are not responsible for delays caused by action or inaction of the buyer, destructive acts of nature, or disruptive civil disorder.

Under the current rule, if a seller represents that insurance or some other form of protection is provided, the contract must clearly state the terms, conditions and limitations, as well as the name and address of the insurer. Further, the seller is required to furnish a copy of the insuring

or protection agreement to the buyer before final payment is made. This proposed rule does not substantially change this requirement, except that it allows the contractor to provide a proof of insurance document rather than the entire policy or agreement.

The current rule contains protections for buyers in the event that the seller fails to complete the project, but also assigns the rights to collect payment to a third party. This proposed rule does not alter this provision, but it inserts an explanatory note.

Under current rules, sellers who provide basement waterproofing services are regulated as home improvement contractors under Ch. ATCP 110 and under Ch. ATCP 111 – Basement Waterproofing Practices. This proposed rule consolidates the content of Ch. ATCP 111 into a section of ATCP 110, without making any substantive changes.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations.

The federal government does not, in general, regulate home improvement practices.

Comparison with Rules in Adjacent States

Most states, including all of Wisconsin's neighbors, have home improvement practices laws. Many of the provisions in ATCP 110 are common in these other states as well.

Illinois regulates home improvement practices through its Home Repair and Remodeling Act and its Home Repair Fraud Act. These provisions are generally similar to Wisconsin's Home Improvement Practices rule.

Iowa grants consumers a private right of action, which enables consumers to sue businesses that engage in deceptive or unfair practices, misrepresentation, or failure to disclose material facts. This law covers home improvement practices, among other areas.

Contractors who do home improvement work in Minnesota and Michigan are required to obtain a license from the state (there are some exceptions). In Minnesota, licensed contractors are required to pay into the Minnesota Contractor's Recovery Fund. This fund compensates people who have suffered losses due to a licensed contractor's fraudulent, deceptive or dishonest practices, misuse of funds, or failure to do the work the contractor was hired to do.

Summary of Factual Data and Analytical Methodologies

The Wisconsin Builders Association estimates that this proposed rule would result in cost savings of roughly \$1 million per year for remodelers and homeowners. This estimate is based on a projection that the proposed rule simplifies compliance and reduces paperwork by about 2 hours per job. Based on an average wage-plus-overhead amount of \$50 dollars per hour, and that there are roughly 10,000 remodeling projects per year in Wisconsin, the total savings is \$1 million.

On a national basis, fixr.com (a web-based contractor referral service) has reported the extent of the home improvement industry on a national basis.

United States Annual Averages 1995 - 2009

	Number of Projects	Total Expenditure	Average Cost Per Project
Room additions and alterations	1,156,018	\$ 23,141,745,151	\$ 20,019
Systems and equipment	9,462,782	\$ 15,061,419,820	\$ 1,592
Outside attachments	549,917	\$ 3,560,131,931	\$ 6,474
Kitchen remodels	1,052,211	\$ 10,638,971,786	\$ 10,111
Other property additions and replacements	3,758,351	\$ 19,767,613,249	\$ 5,260
Exterior additions and replacements	5,636,949	\$ 23,734,265,908	\$ 4,210
Interior additions and replacements	5,186,460	\$ 13,211,085,021	\$ 2,547
Bath remodels	1,030,736	\$ 6,475,917,156	\$ 6,283
Disaster repairs	528,062	\$ 6,448,663,562	\$ 12,212

<http://www.fixr.com/infographics/us-home-improvement-industry-at-a-glance.html>

Complaints against home improvement contractors are consistently ranked in the top ten complaint categories received by The Bureau of Consumer Protection. In 2012, DATCP received 391 written complaints against home improvement contractors.

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

DATCP has consulted with the Wisconsin Builders Association and the National Association of Remodelers – Milwaukee Chapter on the economic impact and the small business impact of this rule.

Effect on Small Business

DATCP anticipates that this rule would affect small business. The existing ATCP 110 regulates businesses that provide home improvement services. Many of these businesses are “small businesses.” They include general contractors, landscapers, plumbers, roofers, window installers, cabinet makers, electricians, and many more. Some of changes to ATCP 110 proposed in this rule will have an effect on some of these businesses. However, DATCP anticipates that those effects will be beneficial. The proposed rule streamlines existing regulations to make them easier for home improvement providers to comply. But the rule does not eliminate these regulations, thereby preserving important protections for consumers. This rule may benefit home improvement contractors in the following ways:

- General contractors working on significant reconstruction projects would no longer be regulated under this proposed rule. Currently, Ch. ATCP 110 does not regulate new home construction but it does regulate home improvement projects. Under this proposal, major reconstructions – those projects where the price of the contract is greater than the

assessed value of the preexisting structure -- would be treated like new home construction.

- For all home improvement contractors, this rule provides some additional flexibility (as long as certain conditions are met). Including:
 - Building permits need only be obtained before work on that portion of the project concerning the building permit. Otherwise, all required building permits must be obtained before any work is completed.
 - Sellers can provide written manufacturers' warranties at the conclusion of the work. Otherwise, written manufacturers' warranties must be provided at the time the product is installed.
 - Under very limited circumstances, sellers can deviate from the written contract based on verbal agreements between the buyer and the seller.
 - The seller cannot be held responsible for delays in contract performance if the seller can demonstrate that delay was caused by actions or inactions of the buyer, destructive acts of nature, or disruptive civil disorder.

Environmental Impact

This rule does not have an environmental impact.

DATCP Contact

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1 SECTION 1. ATCP 110.01 (2) is amended to read:

2 ATCP 110.01 (2) "Home Improvement" means the remodeling, altering, repairing,
3 painting, or modernizing of residential or non-commercial property, or the making of additions
4 thereto, and includes, but is not limited to, the construction, installation, replacement,
5 improvement or repair of driveways, sidewalks, swimming pools, terraces, patios, landscaping,
6 fences, porches, garages, basements and basement waterproofing, fire protection devices, heating
7 and air conditioning equipment, water softeners, heaters and purifiers, wall-to-wall carpeting or

1 attached or inlaid floor coverings, and other changes, repairs or improvements made in or on,
2 attached to or forming a part of the residential or non-commercial property, ~~but does not include~~
3 ~~the construction of a new residence.~~ The term extends to the conversion of existing commercial
4 structures into residential or non-commercial property. "Home improvement" does not include
5 the construction of a new residence or the major renovation of an existing structure.

6 SECTION 2. ATCP 110.01 (2m) is created to read:

7 ATCP 110.01 (2m) "Major renovation of an existing structure" means a renovation or
8 reconstruction contract where the total price of the contract is more than the assessed value of the
9 existing structure at the time the contract is initiated.

10 SECTION 3. ATCP 110.02 (3) (d) is repealed.

11 SECTION 4. ATCP 110.02 (6) (L) to (n) are amended to read:

12 ATCP 110.02 (6) (L) ~~Fail~~ Where the buyer requests lien waivers under s. ATCP 110.025
13 (2), fail to give or furnish to the buyer lien waivers in writing from all contractors, subcontractors
14 and material suppliers at or prior to the time final payment is made on the home improvement
15 contract.

16 (m) Where partial payments are required at various stages in the performance of the
17 contract, and the buyer requests lien waivers under s. ATCP 110.025 (2), fail to give or furnish to
18 the buyer lien waivers in writing from all contractors, subcontractors and material suppliers for
19 the proportionate value of all labor, services and products or materials furnished or delivered as
20 of the time partial payment is made.

21 (n) ~~Fail to disclose~~ provide notice to a buyer as required under s. ATCP 110.025 (1),
22 before the buyer enters into a home improvement contract, that the buyer is entitled to receive
23 written lien waivers ~~according to pars. (L) and (m).~~

1 SECTION 5. ATCP 110.02 (7) (c) is repealed.

2 SECTION 6. ATCP 110.023 is created to read:

3 ATCP 110.023. **Substituting products or materials; altering the written contract.** (1)

4 No seller shall substitute products or materials for those specified in the home improvement
5 contract, or for those which the seller represented would be used in the home improvement,
6 without the prior consent of the buyer. Except as provided in sub. (2), if a written home
7 improvement contract is required under s. ATCP 110.05 (1) or the buyer signs a written contract,
8 the buyer's consent under this paragraph shall also be in writing.

9 **Note:** According to s. 137.15 (3), stats., "If a law requires a record to be in writing, an
10 electronic record satisfies that requirement in that law."

11 (2) **VERBAL AUTHORIZATION.** The seller may act on alterations to the contract that are
12 verbally authorized by the buyer, if all the following conditions are met:

13 (a) The alteration does not represent any additional cost to the buyer.

14 (b) The alteration does not represent a decrease in the value of the materials used or the
15 services provided.

16 (c) The seller maintains documentation of the following:

17 1. The manner in which the buyer communicated the authorization for the alteration. In
18 this subd., "manner" means face-to-face discussion, phone call, or some other method of
19 communicating.

20 2. The name of the buyer who authorized the alteration.

21 3. The date and time that the buyer authorized the alteration.

22 4. A description of the alteration.

(d) The seller must report any alterations documented pursuant to subd. (c), to the buyer before final payment is accepted.

SECTION 7. ATCP 110.025 is created to read:

ATCP 110.025 **Lien waivers.** (1) A seller shall provide notice to buyer that buyer may request written lien waivers from all contractors, subcontractors, and material suppliers at or prior to the time any payment is made on the home improvement contract. Notice shall be provided before the buyer and seller enter into a home improvement contract. The notice shall meet the requirements listed in pars. (a) to (c).

(a) The notice shall be in writing and consist of the following, verbatim statement:

Notice of Consumer's Right to Receive Lien Waivers

If a consumer requests lien waivers, a seller of home improvement services must provide lien waivers from all contractors, subcontractors and material suppliers. This Wisconsin law protects consumers from having liens filed against their property. Lien waivers prevent the filing of a lien on your home in the event that a contractor does not pay suppliers or subcontractors.

For more information about home improvement law, contact the Wisconsin Consumer Protection Bureau at 1-800-422-7128 or www.datcp.wi.gov.

(b) The notice shall be provided as a separate document, written in a clear and conspicuous font, in a format that the buyer can retain.

(c) The seller shall retain evidence of the buyer's acknowledgement of receipt of the notice.

(2) Upon request from the buyer, the seller shall provide the buyer with lien waivers in writing from all contractors, subcontractors and material suppliers for the proportionate value of all labor, services and products or materials furnished or delivered as of the time payment is made. Unless the buyer specifies that the lien waiver request applies only to the final payment, the seller shall provide lien waivers at the time any partial payments are made.

SECTION 8. ATCP 110.027 is created to read:

1 ATCP 110.027 **Delay in contract performance.** (1) A seller must give the buyer timely
2 notice of any impending delay in the home improvement contract performance if performance
3 will be delayed beyond a deadline specified in the home improvement contract. The notice shall
4 specify any reasons for the delay, and shall specify new proposed deadlines by which the seller
5 will begin and complete the work. If a written home improvement contract is required under s.
6 ATCP 110.05 (1) or the buyer signs a written contract, no change in performance deadlines is
7 effective unless the buyer agrees in writing to the change.

8 **Note:** According to s. 137.15 (3), stats., "If a law requires a record to be in writing, an
9 electronic record satisfies that requirement in that law."

10 (2) Notwithstanding sub. (1), a seller shall not be responsible for delays in contract
11 performance if the seller can demonstrate any of the following:

- 12 (a) The delay was caused by actions or inactions of the buyer.
13 (b) The delay was caused by a destructive act of nature such as tornado, flood or fire.
14 (c) The delay was caused by disruptive civil disorder such as a strike, hostile action, or
15 war.

16 **SECTION 9.** ATCP 110.03 (1) is amended to read:

17 ATCP 110.03 (1) Before a buyer enters into a home improvement contract, the seller
18 shall inform the buyer of all building or construction permits that are required for the home
19 improvement. ~~No~~ Except as provided in sub. (4), no seller may start work under a home
20 improvement contract until all required state and local permits have been issued.

21 **SECTION 10.** ATCP 110.03 (3) and (4) are created to read:

22 ATCP 110.03 (3) Pursuant to sub. (2), if the state or local inspector who completed the
23 inspection does not issue an inspection document, the seller may provide a summary of the

1 inspection to the buyer. The summary shall include the inspector's name, the date of the
2 inspection, and inspection number or some other way to identify the inspection in the state or
3 local building inspection database.

4 (4) Notwithstanding sub. (1), if the home improvement contract includes subprojects, no
5 seller may start work on any subproject of a home improvement contract that requires state or
6 local permits until all permits required for that subproject have been issued.

7 **SECTION 11.** ATCP 110.04 (1) is amended to read:

8 ATCP 110.04 (1) A seller shall give a buyer a copy of every written warranty made with
9 respect to labor, services, products or materials furnished in connection with a home
10 improvement. If a seller makes any oral warranty, the seller shall document that warranty in
11 writing and give a copy to the buyer. The seller shall provide all warranty documents to the
12 buyer at the time the buyer enters into a home improvement contract, except that a
13 manufacturer's product warranty may be provided ~~when that product is installed.~~ at any of the
14 following times:

15 (a) At the time the buyer enters into a home improvement contract.

16 (b) At the time the product is installed.

17 (c) At the conclusion of the project, if specified in the contract.

18 **SECTION 12.** ATCP 110.05 (4) and (7) are amended to read:

19 ATCP 110.05 (4) Where a representation is made that insurance or some other form of
20 protection will be provided, the contract shall clearly state the terms, conditions and limitations
21 thereof, as well as the name and address of the insurer or the person who is furnishing such
22 protection, if different from the seller. A copy of the insuring or protection agreement,

1 declarations page, or some other document that shows evidence of insurance or other protection
2 shall be furnished to the buyer before final payment is due under the contract.

3 (7) Liquidated damages for breach of contract by the buyer if made a part of the contract
4 shall not exceed 10% of the contract price ~~and in no event more than \$100.~~

5 SECTION 13. ATCP 110.06 (1) Note is created to read:

6 ATCP 110.06 (1) Note Under this section, where the seller assigns the debt to a finance
7 company before completing the contract and then fails to complete the contract, the finance
8 company is subject to the same claims and defenses the buyer has against the contractor.

9 SECTION 14. ATCP 110.09 (title) is created to read:

10 ATCP 110.09 Basement waterproofing practices.

11 SECTION 15. ATCP 111 Title and preamble notes are repealed.

12 SECTION 16. ATCP 111.01 is renumbered to ATCP 110.09 (1).

13 SECTION 17. ATCP 111.02 (title) and (1) to (4) are renumbered to ATCP 110.09 (2)
14 (title) and (a) to (d).

15 SECTION 18. ATCP 111.02 (5) is repealed.

16 SECTION 19. ATCP 111.02 (6) and (7) are renumbered to ATCP 110.09 (2) (e) and (f).

17 SECTION 20. ATCP 111.03 (intro) and (1) are renumbered to ATCP 110.09 (3) (intro)
18 and (a) and amended to read:

19 ATCP 110.09 (3) PROHIBITED PRACTICES. No seller of basement waterproofing services,
20 products or materials shall engage in the following unfair trade practices or unfair methods of
21 competition:

1 (a) Make or offer to make any guarantee with respect to basement waterproofing services
2 unless the guarantee meets the requirements of s. ~~ATCP 111.04~~ ATCP 110.09 (4), and is
3 furnished to the buyer in writing with a seller's analysis prior to final execution of any contract.

4 **SECTION 21.** ATCP 111.03 (2) to (6) are renumbered to ATCP 110.09 (3) (b) to (f).

5 **SECTION 22.** ATCP 111.03 (7) is renumbered to ATCP 110.09 (3) (g) and amended to
6 read:

7 ATCP 110.09 (3) (g) Sell basement waterproofing services using the pressure pumping
8 method unless the need or effectiveness of such method is established in a seller's analysis
9 verified by an engineer's analysis furnished to the buyer prior to the sale, and the work is
10 guaranteed as provided under ~~ATCP 111.04~~ s. ATCP 110.09 (4).

11 **SECTION 23.** ATCP 111.03 (8) to (10) are renumbered to ATCP 110.09 (3) (h) to (j).

12 **SECTION 24.** ATCP 111.04 (intro) and (1) to (3) are renumbered to ATCP 110.09 (4)
13 (intro) and (a) to (c).

14 **SECTION 25.** ATCP 111.05 is renumbered to ATCP 110.09 (5).

15 **SECTION 26.** ATCP 111.06 is repealed.

16 **SECTION 27. INITIAL APPLICABILITY.** This rule first applies to home improvement
17 contracts that are entered into on the effective date of this rule.

18 **SECTION 28. EFFECTIVE DATE.** This rule takes effect on the first day of the third month
19 following publication in the Wisconsin administrative register, as provided in
20 s. 227.22(2)(intro.), Stats.

Dated this _____ day of _____, _____.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Ben Brancel
Secretary

Wisconsin Department of Agriculture, Trade and Consumer Protection

Final Regulatory Flexibility Analysis

Rule Subject: Home Improvement Practices
Adm. Code Reference: ATCP 110 and ATPC 111
Rules Clearinghouse #: 13-066
DATCP Docket #: 12-R-08

Rule Summary

ATCP 110 currently regulates home improvement practices. Pursuant to the definition of "home improvement," new residential construction is outside of the scope of the current rule and DATCP does not regulate trade practices in the construction of new homes.

Under this proposed rule, the rights and duties contained in ATCP 110 would not apply to very large home improvement projects, defined as those where the value of the project is more than the assessed value of the existing structure. A typical example of this might be a contract to build a new structure on a preexisting foundation.

Under the current rule, home improvement contractors must obtain all required state or local building permits before work can begin under the contract. Under this proposed rule, if a home improvement contract consists of multiple subprojects, contractors may start work on the overall project before obtaining all building permits. However, they may not begin work on a subproject that requires a building permit until after they obtain the permit.

Under the current rule, where a midpoint or final inspection is required by state law or local ordinance, the seller must provide the inspection certificate to the buyer. This proposed rule retains this provision, but in the event the inspector does not physically issue a certificate, the seller may provide a summary of inspection information to the buyer instead of a copy of the certificate.

Under the current rule, sellers must provide manufacturers' product warranties either at the time the buyer and seller enter into the contract or when the product is installed. Under this proposed rule, the seller has the option of providing written manufacturers' warranties at the completion of the project as long as the option is specified in the contract.

Under the current rule, if a home improvement contract contains liquidated damages that penalize a buyer for breaching the contract, the liquidated damages may not exceed 10% of the contract price or \$100, whichever is less. This proposed rule maintains the 10% limit, but it repeals the \$100 maximum.

Under the current rule, the seller may not substitute products or materials from those specified in the home improvement contract, or for those which the seller represented would be used, without prior consent from the buyer. If the home improvement contract is in writing, the prior consent must also be in writing.

The proposed rule maintains the same procedure for altering written contracts as contained in the current rule. However, the proposed rule also allows for buyer authorized verbal alterations to the contract, but only if the following conditions are met:

- The alteration does not represent any additional cost to the buyer
- The alteration does not represent a decrease in the value of the finished product.
- The seller maintains documentation of the alteration, and that the buyer authorized the alteration.

Under the current rule, the seller is required to provide the buyer with lien waivers before accepting final payment. Further, if the contract requires partial payments at various stages in the performance of the contract, the seller is required to provide lien waivers for the proportionate value of all labor, services and products or materials furnished or delivered as of the time partial payment is made. Under the proposed rule, the seller is required to provide the lien waivers if the buyer requests them. Under the proposed rule, the seller is required to provide notice to the buyer that the buyer has a right to request the lien waivers, and retain evidence that the buyer acknowledged receipt of the notice.

Under the current rule, sellers are required to give buyers timely notice of any impending delay in contract performance. If the home improvement contract is in writing (or required to be in writing), the buyer must agree in writing to the change in the schedule. This proposed rule provides that sellers are not responsible for delays caused by action or inaction of the buyer, destructive acts of nature, or disruptive civil disorder.

Under the current rule, if a seller represents that insurance or some other form of protection is provided, the contract must clearly state the terms, conditions and limitations, as well as the name and address of the insurer. Further, the seller is required to furnish a copy of the insuring or protection agreement to the buyer before final payment is made. This proposed rule does not substantially change this requirement, except that it allows the contractor to provide some type of proof-of-insurance document rather than the entire policy or agreement.

The current rule contains protections for buyers in the event that the seller fails to complete the project, but also assigns the rights to collect payment to a third party. This proposed rule does not alter this provision, but it inserts an explanatory note.

Under current rules, sellers who provide basement waterproofing services are regulated as home improvement contractors under Ch. ATCP 110 and under Ch. ATCP 111 – Basement Waterproofing Practices. This proposed rule consolidates the content of Ch. ATCP 111 into a section of ATCP 110, without making any substantive changes.

Small Business Affected

DATCP anticipates that this rule would affect small business. The existing ATCP 110 regulates businesses that provide home improvement services. Many of these businesses are "small businesses." They include general contractors, landscapers, plumbers, roofers, window installers, cabinet makers, electricians, and many more. Some of changes to ATCP 110 proposed in this rule will have an effect on some of these businesses. However, DATCP anticipates that those effects will be beneficial. The rule streamlines existing regulations to make them easier for home improvement providers to comply. But the rule does not eliminate these regulations, thereby preserving important protections for consumers. This rule may benefit home improvement contractors in the following ways:

- General contractors working on significant reconstruction projects would no longer be regulated under this proposed rule. Currently, Ch. ATCP 110 does not regulate new home construction but it does regulate home improvement projects. Under this proposal, major reconstructions – those projects where the price of the contract is at least 150% greater than the appraised value of the preexisting structure -- would be treated like new home construction.
- For all home improvement contractors, this rule provides some additional flexibility (as long as certain conditions are met). Including:
 - Building permits need only be obtained before work on that portion of the project concerning the building permit. Otherwise, all required building permits must be obtained before any work is completed.
 - Sellers can provide written manufacturers' warranties at the conclusion of the work. Otherwise, written manufacturers' warranties must be provided at the time the product is installed.
 - Under very limited circumstances, sellers can deviate from the written contract based on verbal agreements between the buyer and the seller.
 - The seller cannot be held responsible for delays in contract performance if the seller can demonstrate that delay was caused by actions or inactions of the buyer, destructive acts of nature, or disruptive civil disorder.

Reporting, Bookkeeping and other Procedures

Generally, reporting, bookkeeping and other procedures are the same as the current rule. However, this proposed rule does allow home improvement contractors some choices. For example under the current rule, any changes to the home improvement contract must be in writing before any work can proceed under the contract. Under the proposed rule, work can proceed, but only if the seller agrees to maintain certain documentation.

Professional Skills Required

This rule does not represent any requirements for professional skills.

Accommodation for Small Business

Many of the businesses affected by this rule are "small businesses." This rule does not make special exceptions for small businesses because the subject matter does not lend itself to treating different sized home improvement contractors differently.

Conclusion

This rule will generally benefit affected businesses, including "small businesses." Negative effects, if any, will be few and limited. This rule will not have a significant adverse effect on "small business," and is not subject to the delayed "small business" effective date provided in s. 227.22(2)(e), Stats.

Dated this 31 day of October, 2013.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By 

Sandy Chalmers, Administrator
Division of Agricultural Resource Management

ADMINISTRATIVE RULES FISCAL ESTIMATE AND ECONOMIC IMPACT ANALYSIS

Type of Estimate and Analysis

☒ Original ☐ Updated ☐ Corrected

Administrative Rule Chapter, Title and Number

Ch. ATPC 110 and 111, Home Improvement Practices and Basement Waterproofing

Subject

Home improvement practices and basement waterproofing

Fund Sources Affected

☒ GPR ☐ FED ☒ PRO ☐ PRS ☐ SEG ☐ SEG-S

Chapter 20, Stats. Appropriations Affected

20.115 (1) (a) and (jb)

Fiscal Effect of Implementing the Rule

☒ No Fiscal Effect
☐ Indeterminate

☐ Increase Existing Revenues
☐ Decrease Existing Revenues

☐ Increase Costs
☐ Could Absorb Within Agency's Budget
☐ Decrease Costs

The Rule Will Impact the Following (Check All That Apply)

☐ State's Economy

☐ Local Government Units

☒ Specific Businesses/Sectors

☐ Public Utility Rate Payers

Would Implementation and Compliance Costs Be Greater Than \$20 million?

☐ Yes ☒ No

Policy Problem Addressed by the Rule

ATCP 110, Home Improvement Practices, helps ensure fair transactions between home improvement contractors and their customers. This rule regulates many different types of home improvement, remodeling, and repair projects. This rule has been in existence since 1940 and has been modified a number of times, most recently in 2001.

The changes proposed in this rule, generally, represent updates and revisions to keep the rule consistent with current industry practices. It does not represent a major shift in policy from the existing rules.

Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred)

Local Governments

This rule will not impact local governments.

Home Improvement Contractors – General

This proposed rule is updated to reflect current practices in the home improvement industry. The rule will reduce the cost of compliance on home improvement contractors by reducing required paperwork, streamlining processes, and eliminating unnecessary, burdensome requirements. In general, the rule benefits both contractors and consumers by providing additional flexibility, while retaining prohibitions against unfair business practices. Contractors that take advantage of the proposed rule's added flexibility may incur minimal cost as they revise their standard contracts to conform to the new rule.

Home Improvement Contractors that Specialize in Major Reconstruction or Rebuilding of Existing Structures

The current rule (generally) regulates any home improvement work that is done on an existing residential building (see ATCP 110.01 (2), the definition of "home improvement," for a more precise description). The current rule does not, however, regulate new home construction. Under this proposed rule, very large projects, those where the cost of the remodeling project is greater than the appraised value of the structure, would be outside the scope of the rule. This allows contractors who do this type of work to interact with their customers as they would when building a new home.

Basement Waterproofers

Ch. ATCP 111 regulates business practices by basement waterproofers. This proposed rule streamlines the code by moving these provisions into a section of ATCP 110. However, it does not make any substantive changes to the requirements.

Utility Rate Payers

This rule does not impact utility rate payers.

General Public

Chs. ATCP 110 and 111 impact buyers of home improvement services by placing certain requirements and restrictions on home improvement contractors. This proposed rule does not represent a measurable change from this impact.

Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule

Benefits

Home improvement contractors

The proposed rule is intended to reduce the cost of compliance to contractors, which will in turn lead to increased efficiency, profitability, and competition. The rule also retains important prohibitions against unfair trade practices that harm honest businesses and consumers. This rule should benefit home improvement contractors.

General Public

The rule provides additional flexibility in transactions between contractors and consumers. Consumers may benefit when contractors' gains in efficiency and flexibility translate into lower costs and increased competition.

Analysis by the Wisconsin Builders Association

The Wisconsin Builders Association submitted input to be included in the Initial Economic Impact Analysis. (However, those comments were received after the deadline and, therefore, DATCP was unable to incorporate them into them into the initial version of the Economic Impact Analysis, which was presented along with the hearing draft version of the rule.) The Wisconsin Builders Association comments are quoted below:

There will be implementation costs for revising contracts and other forms, and for training remodelers and their staff in the proper use of those revisions. However, those one-time compliance costs will not be significant, and certainly will not cumulatively reach or exceed \$20 million.

The rule is intended to maintain consumer protection while simplifying the paperwork compliance burden for remodeling contractors. Simplified compliance should lead to increased compliance with the rule, and thus greater consumer protection. The rule also recognizes that certain large major renovations are more appropriately regulated as new construction projects, rather than home repair or remodeling projects. This change will also reduce the cost and complexity of compliance.

Simplifying the compliance requirements of the rule will reduce the amount of time required for paperwork. The Wisconsin Builders Association estimates that this rule will reduce that time by approximately 2 hours per remodeling job. Using an average wage-plus-overhead figure of \$50 per hour and estimating that there are 10,000 remodeling projects in Wisconsin annually, a conservative estimate of the savings that will result from this rule change is \$1 million per year. Those savings will be offset initially by the cost of time spent learning how to comply with the revised regulation. We estimate that one-time added cost to be 1 hour per remodeling contractor. Estimating that approximately half of all Wisconsin dwelling contractors are also remodelers, there are roughly 5,000 remodeling contractors. That yields a one-time cost of \$250,000. The benefit of the rule change clearly outweighs the cost.

An important long-range implication of this rule change is reduced consumer complaints. This rule change will make it easier to understand and to comply with consumer protection regulations. When DNR simplified waterway permits under Chapter 30, subsequent program audits revealed a higher rate of compliance by contractors. We anticipate a similar result with this rule change.

Alternatives

DATCP could continue regulating the home improvement industry under existing rules. However, this proposed rule updates and refines existing ATCP 110, Home Improvement Practices. The intent of this rulemaking is to modernize and streamline the requirements, but without sacrificing important consumer protections.

Long Range Implications of Implementing the Rule

Implementing the rule will benefit business, consumers, and the general public. The rule modifications will provide flexibility for businesses while retaining protection for consumers.

Compare With Approaches Being Used by Federal Government

The federal government does not, in general, regulate home improvement practices.

Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

Most states, including all of Wisconsin's neighbors have home improvement practices laws. Many of the provisions in ATCP 110 are common in these other states as well.

Illinois regulates home improvement practices through its Home Repair and Remodeling Act and its Home Repair Fraud Act. These provisions are generally similar to Wisconsin's Home Improvement Practices rule.

Iowa grants consumers a private right of action, which enables consumers to sue businesses that engage in deceptive or unfair practices, misrepresentation, or failure to disclose material facts. This law covers home improvement practices, among other areas.

Contractor who do home improvement work in Minnesota and Michigan are required to obtain a license from the state (there are some exceptions). In Minnesota, licensed contractors are required to pay into the Minnesota Contractor's Recovery Fund. This fund compensates people who have suffered losses due to a licensed contractor's fraudulent, deceptive or dishonest practices, misuse of funds, or failure to do the work the contractor was hired to do.

UNOFFICIAL
ATCP 110 as Revised by Rulemaking Order DATCP Docket # 12-R-08,
Dated October 25, 2013

**Chapter ATCP 110
HOME IMPROVEMENT PRACTICES**

ATCP 110.01 Definitions.
ATCP 110.02 Prohibited trade practices.
ATCP 110.03 Building permits.
ATCP 110.04 Warranties.
ATCP 110.05 Home improvement contract requirements.
ATCP 110.06 Preservation of buyer's claims and defenses.
ATCP 110.07 Contract cancellation; return of payments.
ATCP 110.08 Contract compliance.

History: Chapter Ag 110 as it existed on May 31, 1974 was repealed and a new chapter Ag 110 was created, Register, May, 1974, No. 221, effective June 1, 1974; chapter Ag 110 was renumbered chapter ATCP 110 under s. 13.93 (2m) (b) 1., Stats., Register, April, 1993, No. 448.

Note: This chapter is adopted under authority of s. 100.20 (2), Stats., and is administered by the Wisconsin department of agriculture, trade and consumer protection. Violations of this chapter may be prosecuted under s. 100.20 (6), 100.26 (3) or (6), Stats. A person who suffers a monetary loss because of a violation of this chapter may sue the violator directly under s. 100.20 (5), Stats., and may recover twice the amount of the loss, together with costs and reasonable attorneys' fees.

ATCP 110.01 Definitions. (1) "Buyer" means either of the following persons who is a party or prospective party to a home improvement contract:

(a) The owner of residential or noncommercial property to which the home improvement contract pertains.

(b) The tenant or lessee of residential or noncommercial property to which the home improvement contract pertains if the tenant or lessee is or will be obligated to make a payment under the home improvement contract.

(2) "Home improvement" means the remodeling, altering, repairing, painting, or modernizing of residential or non-commercial property, or the making of additions thereto, and includes, but is not limited to, the construction, installation, replacement, improvement or repair of driveways, sidewalks, swimming pools, terraces, patios, landscaping, fences, porches, garages, basements and basement waterproofing, fire protection devices, heating and air conditioning equipment, water softeners, heaters and purifiers, wall-to-wall carpeting or attached or inlaid floor coverings, and other changes, repairs or improvements made in or on, attached to or forming a part of the residential or non-commercial property, but does not include the construction of a new residence. The term extends to the conversion of existing commercial structures into residential or non-commercial property. "Home improvement" does not include the construction of a new residence or the major renovation of an existing structure.

(2m) "Major renovation of an existing structure" means a renovation or reconstruction contract where the total price of the contract is greater than the assessed value of the existing structure at the time the contract is initiated.

(3) "Residential or non-commercial property" means a structure used, in whole or in part, as a home or place of residence by any natural person, whether or not a single or multi-unit structure, and that part of the lot or site on which it

is situated and which is devoted to the residential use of the structure, and includes all appurtenant structures. The term extends to all other existing non-commercial structures and the immediate premises on which they are situated even though they are not used for residential purposes.

(4) "Home improvement contract" means an oral or written agreement between a seller and an owner or a seller and a tenant or lessee of residential or non-commercial property, or a seller and a tenant or lessee if the tenant or lessee is to be obligated for the payment of home improvements made in, to, or upon such property, and includes all agreements under which the seller is to perform labor or render services for home improvements, or furnish materials in connection therewith.

(5) "Seller" means a person engaged in the business of making or selling home improvements and includes corporations, partnerships, associations and any other form of business organization or entity, and their officers, representatives, agents and employees.

(6) "Warranty" means any warranty or guarantee made with respect to labor, services, products or materials provided under a home improvement contract. "Warranty" includes a seller's warranty and a manufacturer's product warranty.

History: Cr. Register, May, 1974, No. 221, eff. 6-1-74; renum. (1) to (4) to be (2) to (5), cr. (1) and (6), Register, September, 1993, No. 453, eff. 10-1-93.

ATCP 110.02 Prohibited trade practices. No seller shall engage in the following unfair methods of competition or unfair trade practices:

(1) **MODEL HOME REPRESENTATIONS.** Misrepresent or falsely state to a prospective buyer that the buyer's residential or non-commercial property is to serve as a "model" or "advertising job", or use any other prospective buyer lure to mislead the buyer into believing that a price reduction or other compensation will be received by reason of such representations.

(2) **PRODUCTION AND MATERIAL REPRESENTATIONS.** Misrepresent directly or by implication that products or materials to be used in the home improvement:

(a) Need no periodic repainting, finishing, maintenance or other service. (b) Are of a specific or well-known brand name, or are produced by a specific manufacturer or exclusively distributed by the seller.

(c) Are of a specific size, weight, grade or quality, or possess any other distinguishing characteristics or features.

(d) ~~Perform certain functions or substitute for, or are equal in performance to, other products or materials.~~

(e) Meet or exceed municipal, state, federal, or other applicable standards or requirements.

(f) Are approved or recommended by any governmental agency, person, form or organization, or that they are the users of such products or materials.

(g) Are of sufficient size, capacity, character or nature to do the job expected or represented.

(h) Are or will be custom-built or specially designed for the needs of the buyer.

(i) May be serviced or repaired within the buyer's immediate trade area, or be maintained with replacement and repair parts which are readily available.

(3) BAIT SELLING. (a) Offer or represent specific products or materials as being for sale, where the purpose or effect of the offer or representation is not to sell as represented but to bait or entice the buyer into the purchase of other or higher priced substitute products or materials.

(b) Disparage, degrade or otherwise discourage the purchase of products or materials offered or represented by the seller as being for sale, by statements or representations in conflict with other claims or representations made with respect to such products and materials, to induce the buyer to purchase other or higher priced substitute products or materials.

(c) Refuse to show, demonstrate or sell products or materials as advertised, offered, or represented as being for sale.

(d) Substitute products or materials for those specified in the home improvement contract, or for those which the seller represented would be used in the home improvement, without the prior consent of the buyer. If a written home improvement contract is required under s. ATCP 110.05 (1) or the buyer signs a written contract, the buyer's consent under this paragraph shall also be in writing.

(e) Fail to have available a quantity of the advertised product sufficient to meet reasonably anticipated demands.

(f) Misrepresent that certain products or materials are unavailable or that there will be a long delay in their manufacture, delivery, service or installation in order to induce a buyer to purchase other or higher priced substitute products or materials from the seller.

(4) IDENTITY OF SELLER. (a) Deceptively gain entry into the prospective buyer's home or onto the buyer's property under the guise of any governmental or public utility inspection, or otherwise misrepresent that the seller has any official right, duty or authority to conduct an inspection.

(b) Misrepresent that the seller is an employee, officer or representative of a manufacturer, importer or any other person, firm or organization, or that such person, firm or organization will assume some obligation in fulfilling the terms of the contract.

(c) Misrepresent the status, authority or position of the sales representative in the organization he or she represents.

(d) Misrepresent that the seller is licensed, bonded or insured. If the seller represents that the seller is licensed, bonded or insured, the seller shall provide the buyer with a written statement specifically describing the type of license, bond or insurance that the seller possesses.

(5) GIFT OFFERS. Offer or advertise any gift, free item or bonus without fully disclosing the terms or conditions of the offer, including expiration date of the offer and when the gift,

free item or bonus will be given, or fail to comply with the terms of such offer.

(6) PRICE AND FINANCING. (a) Misrepresent to a prospective buyer that an introductory, confidential, close-out, going out of business, factory, wholesale, or any other special price or discount is being given, or that any other concession is made because of materials left over from another job, a market survey or test, or any other reason.

(b) Misrepresent that any person, firm or organization, whether or not connected with the seller, is especially interested in seeing that the prospective buyer gets a bargain, special price, discount or any other benefit or concession.

(c) Misrepresent or mislead the prospective buyer into believing that insurance or some other form of protection will be furnished to relieve the buyer from obligations under the contract if the buyer becomes ill, dies, or is unable to make payments.

(d) Misrepresent or mislead the buyer into believing that no obligation will be incurred because of the signing of any document, or that the buyer will be relieved of some or all obligations under the contract by the signing of any document.

(e) Request the buyer to sign a completion slip or certificate, or make final payment on the contract before the home improvement is completed in accordance with the terms of the contract.

(f) Fail to disclose that the offered or contract price does not include delivery or installation, or that other requirements must be fulfilled by the buyer as a condition to the performance of labor, services, or the furnishing of products or materials at the offered or contract price.

(g) Misrepresent that the down payment or any other sum constitutes the full amount the buyer will be obligated to pay.

(h) Misrepresent or fail to disclose to a buyer, before the buyer enters into a home improvement contract, the existence or amount of any financing charges, interest service charges, credit investigation costs, building or installation permit fees, or other costs or charges to be paid by the buyer.

(i) Fail to disclose that the home improvement contract, promissory note or other evidence of indebtedness may be assigned or sold to a financial institution or any other third party.

(j) Advise or induce the buyer to inflate the value of the buyer's property or assets, or to misrepresent or falsify the buyer's true financial position in order to obtain credit.

(k) Increase or falsify the contract price, or induce the buyer by any means to misrepresent or falsify the contract price or value of the home improvement for financing purposes or to obtain additional credit.

(L) Fail Where the buyer requests lien waivers under s. ATCP 110.025 (2), fail to give or furnish to the buyer lien waivers in writing from all contractors, subcontractors, and material suppliers at or prior to the time final payment is made on the home improvement contract.

(m) Where partial payments are required at various stages in the performance of the contract, and the buyer requests lien waivers under s. ATCP 110.025 (2), fail to give or furnish to the buyer lien waivers in writing from all contractors, subcontractors and material suppliers for the proportionate value of all labor, services and products or materials furnished or delivered as of the time partial payment is made.

(n) Fail to disclose provide notice to a buyer as required under s. ATCP 110.025 (1), before the buyer enters into a

home improvement contract, that the buyer is entitled to receive written lien waivers according to pars. (L) and (m).

(o) Misrepresent that the seller is the only person who can provide financing for the home improvement contract.

(7) PERFORMANCE. (a) Deliver materials, begin work, or use any other tactic to pressure the buyer into a home improvement contract, or make any claim or assertion that a binding contract has been agreed upon where no final agreement or understanding exists.

(b) Solicit or accept any payment for home improvement materials or services which the seller does not intend to provide according to the terms of the home improvement contract, or which the seller has reason to believe will not be provided according to the terms of the contract.

(c) Fail to give the buyer timely notice of any impending delay in contract performance, if performance will be delayed beyond a deadline specified in the contract. The notice shall specify the reasons for the delay, and shall specify new proposed deadlines by which the seller will begin and complete the work. If a written home improvement contract is required under s. ATCP 110.05 (1) or the buyer signs a written contract, no change in performance deadlines is effective unless the buyer agrees in writing to the change.

(8) INTERFERENCE WITH COMPETITORS. (a) Make false derogatory statements concerning any competitor, the competitor's equipment, products or materials, workmanship, performance, reputation or responsibility, or attempt to or induce the breach of any existing home improvement contract between a prospective buyer and a competitor, or interfere with or obstruct the performance of any home improvement contract by a competitor.

(b) Misrepresent that the work of a competitor was performed by the seller.

(c) Misrepresent that the seller's products, materials or workmanship are equal to or better than those of a competitor.

(d) Use or imitate the trade-marks, trade names, labels or other distinctive marks of a competitor.

(9) SALES REPRESENTATIONS. (a) Misrepresent or mislead the buyer into believing that a purchase will aid or help some public, charitable, religious, welfare or veteran's organization, or any other person, group or organization, or misrepresent the extent of such aid or assistance.

(b) Fail to make any statement of fact, qualification or explanation if the omission of such statement, qualification or explanation causes an advertisement, announcement, statement or representation to be false, deceptive or misleading.

(c) Misrepresent that the customer's present equipment, material, product, home or a part thereof is dangerous or defective, or in need of repair or replacement.

(10) MISAPPROPRIATION OF BUYER'S PREPAYMENTS. Use any home improvement contract payment, received from a buyer prior to the completion of a home improvement, for any purpose other than to provide materials or services for the home improvement.

(11) MISREPRESENTATIONS; GENERAL. Make any false, deceptive or misleading representation in order to induce any person to enter into a home improvement contract, to obtain or keep any payment under a home improvement contract, or to delay performance under a home improvement contract.

History: Cr. Register, May, 1974, No. 221, eff. 6-1-74; am. (7) (b) and (9) (c), Register, March, 1976, No. 243, eff. 4-1-76; corrections in (6) made under s. 13.93 (2m) (b) 5., Stats., Register, April, 1993, No. 448; cr. (4) (d), (6) (n) and (o), (10) and (11), am. (3) (d), (6) (g) and (h) and (7) (c), r. and recr. (7)

(b), Register, September, No 453, eff. 10-1-93; CR 01-028: am. (3) (d) and (7) (c), Register September 2001 No. 549, eff. 10-1-01.

ATCP 110.023 Substituting products or materials; altering the written contract. (1) No seller shall substitute products or materials for those specified in the home improvement contract, or for those which the seller represented would be used in the home improvement, without the prior consent of the buyer. Except as provided in sub. (2), if a written home improvement contract is required under s. ATCP 110.05 (1) or the buyer signs a written contract, the buyer's consent under this paragraph shall also be in writing.

Note: According to s. 137.15 (3), stats., "If a law requires a record to be in writing, an electronic record satisfies that requirement in the law."

(2) VERBAL AUTHORIZATION. The seller may act on alterations to the contract that are verbally authorized by the buyer, if all the following conditions are met:

(a) The alteration does not represent any additional cost to the buyer.

(b) The alteration does not represent a decrease in the value of the materials used or the services provided.

(c) The seller maintains documentation of the following:

1. The manner in which the buyer communicated the authorization for the alteration. In this subd., "manner" means face-to-face discussion, phone call, or some other method of communicating.

2. The name of the buyer who authorized the alteration.

3. The date and time that the buyer authorized the alteration.

4. A description of the alteration.

(d) The seller must report any alterations documented pursuant to subd. (b), to the buyer before final payment is accepted.

ATCP 110.025 Lien waivers. (1) A seller shall provide notice to buyer that buyer may request written lien waivers from all contractors, subcontractors, and material suppliers at or prior to the time any payment is made on the home improvement contract. Notice shall be provided before the buyer and seller enter into a home improvement contract. The notice shall meet the requirements listed in pars. (a) to (c).

(a) The notice shall be in writing and consist of the following, verbatim statement:

If a consumer requests lien waivers, a seller of home improvement services must provide lien waivers from all contractors, subcontractors and material suppliers. This Wisconsin law protects consumers from having liens filed against their property. Lien waivers prevent the filing of a lien on your home in the event that a contractor does not pay suppliers or subcontractors.

For more information about home improvement law, contact the Wisconsin Consumer Protection Bureau at 1-800-422-7128 or www.datcp.wi.gov.

(b) The notice shall be provided as a separate document, stated in a clear and conspicuous font, in a format that the buyer can retain.

(c) The seller shall retain evidence of the buyer's acknowledgement of receipt of the notice.

(2) Upon request from the buyer, the seller shall provide the buyer with lien waivers in writing from all contractors,

subcontractors and material suppliers for the proportionate value of all labor, services and products or materials furnished or delivered as of the time payment is made. Unless the buyer specifies that the lien waiver request applies only to the final payment, the seller shall provide lien waivers at the time any partial payments are made.

ATCP 110.027 Delay in contract performance. (1)

A seller must give the buyer timely notice of any impending delay in the home improvement contract performance if performance will be delayed beyond a deadline specified in the home improvement contract. The notice shall specify any reasons for the delay, and shall specify new proposed deadlines by which the seller will begin and complete the work. If a written home improvement contract is required under s. ATCP 110.05 (1) or the buyer signs a written contract, no change in performance deadlines is effective unless the buyer agrees in writing to the change.

Note: According to s. 137.15 (3), stats., "If a law requires a record to be in writing, an electronic record satisfies that requirement in the law."

(2) Notwithstanding sub. (1), a seller shall not be responsible for delays in contract performance if the seller can demonstrate any of the following:

(a) The delay was caused by actions or inactions of the buyer.

(b) The delay was caused by a destructive act of nature such as tornado, flood or fire.

(c) The delay was caused by disruptive civil disorder such as a strike, hostile action, or war.

ATCP 110.03 Building permits. (1)

Before a buyer enters into a home improvement contract, the seller shall inform the buyer of all building or construction permits that are required for the home improvement. No Except as provided in sub. (4), no seller may start work under a home improvement contract until all required state and local permits have been issued.

(2) Where midpoint or final inspections are required under state laws or local ordinances, copies of inspection certificates shall be furnished to the buyer when construction is completed and before final payment is due or the signing of a completion slip is requested of the buyer.

(3) Pursuant to sub. (2), if the state or local inspector who completed the inspection does not issue an inspection document, the seller may provide a summary of the inspection to the buyer. The summary shall include the inspector's name, the date of the inspection, and inspection number or some other way to identify the inspection in the state or local building inspection database.

(4) Notwithstanding sub. (1), if the home improvement contract includes subprojects, no seller may start work on any subproject of a home improvement contract that requires state or local permits until all permits required for that subproject have been issued.

History: Cr. Register, May, 1974, No. 221, eff. 6-1-74; am. (1), Register, September, 1993, No. 453, eff. 10-1-93.

ATCP 110.04 Warranties. (1)

A seller shall give a buyer a copy of every written warranty made with respect to labor, services, products or materials furnished in connection with a home improvement. If a seller makes any oral warranty,

the seller shall document that warranty in writing and give a copy to the buyer. The seller shall provide all warranty documents to the buyer at the time the buyer enters into a home improvement contract, except that a manufacturer's product warranty may be provided when that product is installed, at any of the following times:

(a) At the time the buyer enters into a home improvement contract.

(b) At the time the product is installed.

(c) At the conclusion of the project, if specified in the contract.

(2) If a seller warrants any labor, service, product or material furnished in connection with a home improvement, the warranty shall be clear and specific and shall clearly specify all of the following:

(a) Any warranty conditions or exclusions.

(b) Any limitations on the scope or duration of the warranty.

(c) The time period within which the seller will perform the seller's warranty obligations after the buyer makes a valid warranty claim.

(3) No seller may give any warranty which the seller does not intend to honor in full, or which the seller has reason to believe will not be honored in full.

History: Cr. Register, May, 1974, No. 221, eff. 6-1-74; r. and rec. Register, September, 1993, No. 453, eff. 10-1-93.

ATCP 110.05 Home improvement contract requirements.

(1) The following home improvement contracts and all changes in the terms and conditions thereof, shall be in writing:

(a) Contracts requiring any payment of money or other consideration by the buyer prior to completion of the seller's obligation under the contract.

(b) Contracts which are initiated by the seller through face-to-face solicitation away from the regular place of business of the seller, mail or telephone solicitation away from the regular place of business of the seller, mail or telephone solicitation, or handbills or circulars delivered or left at places of residence.

(2) If sub. (1) requires a written home improvement contract or the buyer signs a written contract, the written contract shall be signed by all parties and shall clearly, accurately and legibly set forth all material terms and conditions of the contract, including:

(a) The name and address of the seller, including the name and address of the sales representative or agent who solicited or negotiated the contract for the seller.

(b) A description of the work to be done and the principal products and materials to be used or installed in performance of the contract. The description shall include, where applicable, the name, make, size, capacity, model and model year of principal products or fixtures to be installed, and the type, grade, quality, size or quantity of principal building or construction materials to be used. Where specific representations are made that certain types of products or materials will be used, or the buyer has specified that certain types of products or materials are to be used, a description of such products or materials shall be clearly set forth in the contract.

(c) The total price or other consideration to be paid by the buyer, including all finance charges. If the contract is one for time and materials the hourly rate for labor and all other terms and conditions of the contract affecting price shall be clearly stated.

(d) The dates or time period on or within which the work is to begin and be completed by the seller.

(e) A description of any mortgage or security interest to be taken in connection with the financing or sale of the home improvement.

(f) A statement of any guarantee or warranty with respect to any products, materials, labor or services made by the seller or which are required to be furnished to the buyer under s. ATPC 110.04 (1).

(g) A description or identification of any other document which is to be incorporated in or form part of the contract.

(3) Before the seller begins work or receives any payment under a written home improvement contract, the seller shall provide the buyer with a copy of the contract.

(4) Where a representation is made that insurance or some other form of protection will be provided, the contract shall clearly state the terms, conditions and limitations thereof, as well as the name and address of the insurer or the person who is to furnish such protection, if different from the seller. A copy of the insuring or protection agreement, declarations page, or some other document that shows evidence of insurance or other protection shall be furnished to the buyer before final payment is due under the contract.

(5) If a person other than the seller is to act as the general contractor or assume responsibility for performance of the contract, the name and address of such person shall be disclosed in the oral or written contract, except as otherwise agreed, and the contract shall not be sold or assigned without the written consent of the buyer.

(6) Before a buyer enters into a written home improvement contract prepared or offered by the seller, the seller shall determine if the buyer is able to read and understand the contract. If the buyer is blind or unable to read the contract, the written contract shall be read and explained to the buyer by a third party designated by the buyer and having no connection with the seller. If a language other than English is primarily used in contract negotiations, the written contract shall be both in English and in the language used to negotiate the contract.

(7) Liquidated damages for breach of contract by the buyer if made a part of the contract shall not exceed 10% of the contract price and ~~in no event more than \$100.~~

(8) If the buyer is required to sign a note, the amount and terms of the note shall correspond exactly with those stated in the oral or written contract.

History: Cr. Register, May, 1974, No. 221, eff. 6-1-74; am. (2) (intro.), (3) and (6), r. (9), Register, September, 1993, no. 453, eff. 10-1-93; CR 01-028: am. (2) (intro.), Register September 2001 No. 549, eff. 10-1-01. Register October 2004 No. 586

ATCP 110.06 Preservation of buyer's claims and defenses. (1) Every assignee of a home improvement contract takes subject to all claims and defenses of the buyer or successors in interest.

Note: Under this section, where the seller assigns the debt to a finance company before completing the contract and then fails to complete the contract, the finance company is subject to the same claims and defenses the buyer has against the contractor.

(2) No seller shall enter into any home improvement contract wherein the buyer waives the right to assert against the seller or any assignee any claim or defense the buyer may have against the seller under the contract.

(3) No seller shall use any promissory note or instrument, other than a check, in connection to a home improvement contract unless it bears the following statement in contrasting bold-face type: "This is a home improvement instrument and is non-negotiable."

Every holder takes subject to claims and defenses of the maker or obligor."

(4) Every holder or transferee of a negotiable instrument executed in violation of this section, who knew or should have known at the time the document was acquired that it was made to evidence an obligation for home improvements, or who knew or should have known that the payee or transferor was engaged in the home improvement business, takes subject to all claims and defenses of the maker or obligor.

(5) Claims and defenses of any buyer against an assignee or transferee under the contract shall be limited to the total amount for which the buyer was obligated at the time of entering into the contract.

History: Cr. Register, May, 1974, No. 221, eff. 6-1-74; correction in (1) made under s. 13.93 (2m) (b) 5., Stats., Register, April, 1993, No. 448.

ATCP 110.07 Contract cancellation; return of payments.

(1) **CONDITIONS WARRANTING EXERCISE OF BUYER'S REMEDIES.** If, under a home improvement contract, a buyer pays a seller for any home improvement materials or services before the seller provides those materials or services to the buyer, the buyer may proceed under sub. (2) if any of the following occurs:

(a) The seller fails to provide the materials or services by a deadline specified in the home improvement contract.

(b) The seller fails to give buyer notice of an impending delay as required under s. ATPC 110.02 (7) (c), or fails to obtain the buyer's agreement to a new performance deadline.

(c) The buyer believes that the seller has failed to provide the materials or services in a timely manner, and the home improvement contract specifies no deadline for the seller to provide the materials or services.

(2) **BUYER'S REMEDIES.** If the conditions under sub. (1) are met, the buyer may do all of the following:

(a) Cancel the contract.

(b) Demand return of all payments which the seller has not yet expended on the home improvement.

(c) If the seller has used any of the buyer's payments to purchase materials for the home improvement, demand delivery to the home improvement site of those materials which have not yet been used for the home improvement or delivered to the site.

(d) Demand a written accounting for all payments that the buyer made to the seller. The written accounting shall detail how all payments were used by the seller.

(3) **BUYER'S EXERCISE OF REMEDIES; PROCEDURE.** In order to exercise any remedy under sub. (2), the buyer shall deliver written notice to the seller, or to the seller's officer, director or agent. Notice shall be delivered in person, by certified mail to the seller's last known address, or by regular mail with evidence of mailing to the seller's last known address. If notice is mailed to the seller, the date on which the post office receives the notice for delivery is considered the date of

service for purposes of sub. (4). Compliance with this subsection is not a prerequisite to the buyer's exercise of other remedies other than those specified under sub. (2).

(4) **COMPLIANCE BY SELLER.** (a) If the buyer demands the return of payments to which the buyer is entitled under sub. (2) (b), the seller shall return those payments to the buyer within 15 calendar days after the buyer's demand is served on the seller under sub. (3).

(b) If the buyer demands delivery of materials to which the buyer is entitled under sub. (2) (c), the seller shall deliver those materials to the home improvement site within 15 calendar days after the buyer's demand is served on the seller under sub. (3), or within 5 calendar days after the seller receives the materials from the seller's supplier, whichever occurs later.

(c) If the buyer demands an accounting to which the buyer is entitled under sub. (2) (d), the seller shall provide the buyer with the written accounting within 30 calendar days after the buyer's demand is served on the seller under sub. (3).

(5) **REMEDIES NOT EXCLUSIVE.** A buyer's remedies under this section are in addition to any other legal remedies available to the buyer. They are not a prerequisite to the exercise of any other remedies, nor do they limit any other remedies.

History: Cr. Register, September, 1993, No. 453, eff. 10-1-93.

ATCP 110.08 Contract compliance. A home improvement contract which constitutes a "consumer approval transaction" as defined in s. 423.201, Stats., shall comply with ch. 423, Stats.

History: Cr. Register, September, 1993, No. 453, eff. 10-1-93.

Chapter ATCP 111 BASEMENT WATERPROOFING PRACTICES

ATCP 111.01 Declaration of policy.

ATCP 111.02 Definitions.

ATCP 111.03 Prohibited practices.

ATCP 111.04 Guarantees.

ATCP 111.05 Seller's analysis.

ATCP 111.06 Interpretation.

Note: Chapter Ag 133 was renumbered chapter ATCP 111 under s. 13.93 (2m) (b).

1, Stats., Register, April, 1993, No. 448.

Note: This chapter is adopted under authority of s. 100.20 (2), Stats., and is administered

by the Wisconsin department of agriculture, trade and consumer protection. Violations of this chapter may be prosecuted under s. 100.20 (6), 100.26 (3) or (6);

Stats. A person who suffers a monetary loss because of a violation of this chapter may sue the violator directly under s. 100.20 (5), Stats., and may recover twice the amount of the loss, together with costs and reasonable attorneys' fees.

ATCP 110.09 Basement waterproofing practices.

ATCP 111.01 (1) DECLARATION OF POLICY.

Basement waterproblems and particularly those arising from poor drainage or high water tables are often difficult to correct without a thorough analysis of causative factors and the performance of extensive and costly waterproofing services. The effectiveness of such services, unlike many other services, cannot readily be determined until heavy rains or other conditions responsible for basement water problems occur. In the performance of basement waterproofing services certain methods or processes have been used at substantial cost to the

consumer which are ineffective, inadequate or unsuitable for the correction of basement water problems. Guarantees, if given, may often be vague, ambiguous or unenforceable against the seller, or otherwise made without reasonable expectancy of performance on the part of the seller to the detriment of the buyer. These and other abuses in the sale of basement waterproofing services are contrary to the public interest and are unfair trade practices and unfair methods of competition prohibited under s. 100.20, Stats.

History: Cr. Register, March, 1975, No. 231, eff. 4-1-75.

ATCP 111.02 (2) DEFINITIONS. (4) (a)

"Advertising" means any oral, written, printed or graphic statement or representation made in connection with the solicitation or sale of basement waterproofing services.

(2) (b) "Basement waterproofing" means the use or application of materials or processes for the prevention or control of water leakage or flow through the basement walls or flooring into the interior portion of a basement.

(3) (c) "Engineer's analysis" means a written report from a professional engineer registered in the state of Wisconsin containing an analysis of soil conditions, water tables or pressure, and other factors or conditions affecting the existence and correction of basement water problems, and an opinion as to the probability that the process and the particular substances or materials which are to be used in the performance of basement waterproofing services will or will not cure the basement water problem or have a significant waterproofing effect.

(4) (d) "Pressure pumping" means a basement waterproofing process by which a substance is injected into the ground adjacent to the basement walls or beneath the basement foundation or floor by pipes or other conduits for the purpose of protecting or sealing the basement walls, foundation or floors against water penetration.

(5) "Seller" means a person, firm, corporation or other business organization or entity engaged in the business of basement waterproofing and includes any of their representatives, agents and employees.

(6) (e) "Seller's analysis" is a written statement by the seller of the causes and conditions responsible for the buyer's basement water problem and the specific processes and materials to be used in correcting the problem.

(7) (f) "Guarantee" means any promise, made by or on behalf of the seller in connection with the sale of basement waterproofing services, which provides that the seller's services, materials or workmanship are defect free or will meet a specified level of performance over a specified period of time, or which provides that the seller will correct, repair, service, replace, make refunds for or otherwise remedy any systems, problems, defects or malfunctions that relate to or arise out of basement waterproofing services. The term includes service contracts or agreements made by or on behalf of the seller in connection with a basement waterproofing contract under which the seller provides or agrees to perform, over a fixed or extended period of time, basement waterproofing inspection, maintenance or repair services, whether or not a separate or additional charge is made for such services.

ATCP 111.03 (3) PROHIBITED PRACTICES. No seller of basement waterproofing services, products or

materials shall engage in the following unfair trade practices or unfair methods of competition:

(1) (a) Make or offer to make any guarantee with respect to basement waterproofing services unless the guarantee meets the requirements of s. ATCP 111.04-ATCP 110.09 (4), and is furnished to the buyer in writing with a seller's analysis prior to final execution of any contract.

(2) (b) Make any guarantee the seller knows or reasonably ought to know cannot be performed or which exceeds the period of time

the seller or other persons obligated under the guarantee may be

able to honor or perform under the guarantee.

(3) (c) Submit a seller's analysis to the buyer which the seller

knows or reasonably ought to know is founded on incorrect facts

or conclusions.

(4) (d) Enter into a basement waterproofing contract which provides, in whole or in part, for the performance of services which the seller knows or reasonably ought to know are unnecessary or will not materially serve to correct the buyer's basement water problem, unless such unnecessary or noncorrective services are separately and distinctly identified and enumerated in the seller's analysis, or an amendment thereto, provided to the buyer prior to execution of a basement waterproofing contract.

(5) (e) Advertise basement waterproofing services in a manner which explicitly states or otherwise suggests or implies that such services will be guaranteed unless they are in fact guaranteed and a copy of the guarantee is furnished to the buyer in connection with any basement waterproofing contract.

(6) (f) Advertise that basement waterproofing services of the seller are or will be effective unless the seller is experienced in and uses basement waterproofing methods generally recognized as being effective for the prevention or control of basement water problems in the basement waterproofing industry.

(7) (g) Sell basement waterproofing services using the pressure pumping method unless the need or effectiveness of such method is established in a seller's analysis verified by an engineer's analysis furnished to the buyer prior to the sale, and the work is guaranteed as provided under s. ATCP 111.04 ATCP 110.09 (4)

(8) (h) Advertise basement waterproofing services using the pressure pumping process without disclosing in the advertisement that an engineer's analysis recommending this process is required as a condition to the use thereof and must be furnished to the buyer before a contract is signed.

(9) (i) Enter into any contract for basement waterproofing services which does not contain all agreements, promises or representations made with respect to such services, and which is not in writing and signed by the buyer and seller.

(10) (j) Fail to provide, in all instances where the seller's basement waterproofing services are not guaranteed, the following disclaimer, which shall be set forth on the face of the contract, separate and apart from all other contract provisions and in bold face type: "THE BASEMENT

WATERPROOFING SERVICES PROVIDED BY THIS CONTRACT ARE NOT GUARANTEED."

~~ATCP 111.04~~ (4) GUARANTEES. (4) (a) All guarantees shall be furnished to the buyer in writing prior to the final execution of any contract and include the name and address of the seller or person responsible for performance under the guarantee. Guarantees shall be considered part of the basement waterproofing contract and any breach in the terms or conditions thereof shall entitle the buyer to a full refund of money paid under the contract, less the value of benefits actually derived from the performed services. The burden of establishing any benefit to the buyer shall be on the seller.

(2) (b) All guarantees shall be set forth in clear and explicit terms and shall fully guarantee that the work or services to be performed will effectively prevent or control the basement water problem they were designed or intended to prevent or control for the period of time specified in the guarantee. Basement dampness may be excluded from the guarantee if agreed to by the buyer in writing and the guarantee or contract contains the following statement in bold face type: "THE GUARANTEE PROVIDED HEREIN DOES NOT COVER DAMPNES ON THE BASEMENT WALLS—IT DOES COVER ANY WATER LEAKAGE OR FLOW."

(3) (c) All guarantees shall contain a provision that any remedial work or services to be performed under the guarantee shall begin within 45 days and be completed within 6 months after notice by the buyer to the seller of any failure of the waterproofing services under the contract. Notice of any claim by the buyer under the guarantee shall be deemed actual notice if mailed by certified mail to the seller's address as set forth in the guarantee.

~~ATCP 111.05~~ (5) SELLER'S ANALYSIS. Sellers of basement waterproofing services shall prepare and furnish to the buyer a signed copy of the seller's analysis prior to the final execution of any basement waterproofing contract.

~~ATCP 111.06 Interpretation.~~ A seller under this chapter is also a seller under s. ATCP 110.01 (5) and is subject to ch. ATCP 110. In the event of any conflict between this chapter and ch. ATCP 110, such that a seller cannot comply with one chapter without violating the other, this chapter shall prevail.

